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No. 79-313

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELLIS GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1979 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on August 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced because his trial was conducted under the obscenity standards of *Miller* v. *California*, 413 U.S. 15 (1973), and his guilt was

determined under the standards of *Roth* v. *United States*, 354 U.S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

STATEMENT

Following a jury-waived trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy to distribute an obscene film in interstate commerce, in violation of 18 U.S.C. 371 and 1462.[1] Imposition of a prison sentence was suspended and petitioner was placed on one year's probation and fined $3,000. The court of appeals affirmed in an opinion on which we largely rely (Pet. App. 1a-18a).

On February 15, 1973, a federal grand jury in Memphis, Tennessee, indicted petitioner and 24 other individuals and organizations, charging them with conspiring to produce and distribute the obscene film "School Girl" in interstate commerce. Petitioner distributed the film for public exhibition in several New England states (Pet. App. 2a, 26a).

The government's proof at trial was largely derived from stipulations as to the testimony of Saul Shiffrin, an unindicted co-conspirator. The stipulations established that Shiffrin had conversed with petitioner and other sub-distributors to obtain their participation in the distribution of the film in their respective areas. The customary distribution procedures, which petitioner and other sub-

[1]Petitioner was one of 12 defendants convicted on the conspiracy count in the non-jury trial; seven other defendants elected to be tried before a jury and were acquitted of the conspiracy charges but were found guilty of substantive offenses.

Three of the remaining six defendants tried by Judge McRae were acquitted, and three were not tried.

distributors to ship prints of the film to each other upon demand. Shiffrin's stipulated testimony established that petitioner and the other sub-distributors agreed to these procedures and that petitioner and the other sub-distributors had performed each of the overt acts alleged against them.

ARGUMENT

1. In *Marks* v. *United States*, 430 U.S. 188, 196-197 (1977), this Court held that alleged violations of obscenity laws occurring before this Court's decision in *Miller* v. *California*, 413 U.S. 15 (1973) must be decided under the standard of *Roth* v. *United States*, 354 U.S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966) (*Roth-Memoirs*) plus whatever benefit *Miller* secured. Petitioner invokes *Marks* to argue that the jury-waived trial of his pre-*Miller* conduct was erroneously conducted under the *Miller* test. However, as petitioner concedes (Pet.8), the district court did in fact decide the obscenity question in this case under *Roth-Memoirs*.[2] Petitioner was not prejudiced by this course of events.

[2]As the court of appeals explained (Pet. App. 3a) (footnotes omitted): "[A]fter the trial of the case but before filing his decision and entering judgment, the district judge learned that the Supreme Court had granted certiorari in *Marks*, *supra*, and accordingly delayed further proceedings in the case until the appeal was decided. On March 1, 1977, the Supreme Court held that persons indicted for conduct occurring before *Miller* were entitled to all of the benefits which *Miller* might confer, but were also entitled to application of the pre-existing *Roth-Memoirs* test of obscenity, which provided that materials could not be found to be obscene unless they were 'utterly without redeeming social value.' *Marks* v. *United States*, 430 U.S. 188, 196-97 (1977) (*Marks* II). On July 28, 1977, approximately five months after the Supreme Court's decision in *Marks II*, Judge McRae filed his findings of fact and conclusions of law. Applying both the *Miller* and *Roth-Memoirs* tests, he adjudged the film to be obscene and found the appellants guilty."

In an opinion on which we rely, the court of appeals properly disposed of petitioner's argument (Pet. App. 6a-7a):

> While there was some suggestion on appeal that certain of the defendants might have wished, as a matter of afterthought, to introduce further expert testimony on the obscenity question and its application under pre-*Miller* standards, nothing concrete has been offered or even suggested which would indicate how the defendants would have conducted themselves differently, had it been known at the time of trial that pre-*Miller* standards were still applicable.
>
> More particularly, certain appellants, notably [petitioner], complain that the submission of the case on the *Miller* standards denied them an opportunity to "present evidence or argue that the film did not violate the *Memoirs* test, particularly the last part, requiring that the material be 'utterly without redeeming social value' for it to be found obscene." The simple answer to this, as we mentioned above, is that no offer was ever made, although many months elapsed from the date of trial due to the trial court's decision to wait for further guidance from the Supreme Court. More particularly, despite an interval of nearly five months between the Supreme Court's decision in *Marks* and Judge McRae's opinion, not one defendant sought any right to re-argue the case under the old standards, or to submit additional evidence or to make any offer of proof as to what additional evidence he wished to submit, once the standard had been clarified. We can only view this, therefore, as an effort to obtain a second bite of the apple, and not as any claim of serious prejudice to any right of fair trial.

Petitioner now argues (Pet. 9) that he was "denied the right to present a defense" because certain unspecified "evidence" was allegedly inadmissible under *Miller* but admissible under *Roth-Memoirs*. But, as the court of appeals noted (Pet. App. 6a), "[t]here is * * * no complaint that the district court erred in excluding any evidence proffered * * *."

Nor is there any substance to petitioner's related claim that the adjustment in the applicable standard rendered petitioner's waiver of a jury trial involuntary. An unforeseen change in circumstances during trial does not necessarily invalidate a voluntary waiver of a jury trial. See *United States* v. *Colacurcio*, 499 F. 2d 1401, 1405 (9th Cir. 1974); *United States* v. *Sandrzadeh*, 440 F. 2d 389, 390 (9th Cir. 1971). Indeed, petitioner's claim that the waiver was involuntary rings hollow, because he received the benefit of a determination of obscenity based on *Roth-Memoirs*.[3] As the court of appeals correctly held (Pet. App. 7a-8a):

> [U]nder the circumstances here, neither the parties' trial strategy, their decision to have waived a jury, nor the trial judge's consideration of the evidence, were adversely affected by the fact that the case was tried upon the understanding of the law prevailing in [the Sixth] circuit and decided on a somewhat variant and later construction announced by the Supreme Court.

2. Petitioner further argues that the acquittal of defendants Sherpix, Art Theatre Guild, Gordon Craddock and Craddock Films on the conspiracy count in the

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[3]Indeed, as the court below pointed out, the trial judge was scrupulously aware of the proper test when he set aside the convictions of co-defendants where the jury had been improperly charged solely under *Miller* (Pet. App. 6a n.7).

jury trial deprived the district court of venue in petitioner's case. Petitioner's contention rests on a premise that the court of appeals found to be "without factual support in the record" (Pet. App. 12a)—namely, that those defendants were the only alleged co-conspirators to have committed overt acts within the Western District of Tennessee. Petitioner also ignores the fact that, while those defendants were acquitted of the conspiracy, they were convicted on the substantive counts constituting the overt acts alleged in the conspiracy count.

The district court found that a conspiracy existed between petitioner and Shiffrin, and Shiffrin's stipulated testimony supports that finding. See Pet. App. 12a-13a; A. 712-713.[4] As the court of appeals further pointed out (Pet. App. 12a):

> More fundamentally, however, we do not view the acquittal of Sherpix, Art Theatre Guild, Craddock and Craddock Films on the conspiracy charge as conclusive evidence that, for the purposes here, they did not actually commit the overt acts charged to them in the indictment. *See United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

Ample evidence was presented to show overt acts in the Western District of Tennessee. Shiffrin's testimony connected petitioner to the nationwide distribution scheme, and the "interdependence of the sub-distributors and their agreement to act in concert with one another in the circulation of the film * * * tied them together in a single criminal undertaking" (Pet. App. 11a). See *Hyde* v. *United States*, 225 U.S. 347, 365-367 (1912).

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[4] "A." refers to the joint appendix in the court of appeals.

3. Petitioner finally complains that the district court erred in refusing to permit him to introduce evidence as to the obscenity standards of communities in New England, petitioner's distribution area.

The court of appeals expressed doubt that the question had been adequately preserved for review (Pet. App. 15a) but held that, assuming it had, the district court did not abuse its discretion in refusing to consider such evidence (Pet. App. 15a-16a). As the court stated in rejecting a closely related argument (Pet. App. 13a):

> Once the conspiracy to which they belonged was shown to have extended to and operated in Memphis, the defendants had no right to have the obscenity of the film tried according to the community standards of other localities in which they might conceive public attitudes to be more permissive.

Petitioner seeks support from this Court's statement in *Hamling* v. *United States*, 418 U.S. 87, 106 (1974), that: "this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, *if it felt such evidence would assist the jurors* in the resolution of the issues which they were to decide" (emphasis added). But the decision thus lies in the discretion of the trial court; it is not required to admit such evidence in every case. See *Hamling* v. *United States*, *supra*, 418 U.S. at 123.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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